

LAW OFFICE OF
DAVID J. WEINSOFF
138 Ridgeway Avenue
Fairfax, California 94930
tel. 415-460-9760
david@weinsofflaw.com

Via Certified Mailing – Return Receipt

September 8, 2020

Stephen Myers, CEO and Registered Agent
Enrique Castro, Operations Manager
Managing Agent
Markham Vineyards
2812 Saint Helena Hwy N.
P.O. Box 636
St. Helena, CA 94574-0636

Stephen Myers, Managing Director
Distinguished Vineyards & Wine Partners
900 Larkspur Landing Circle, Suite 120
Larkspur, CA 94939

Re: Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act (Clean Water Act)

Dear Mr. Myers, Mr. Castro, and Managing Agent:

NOTICE OF ALLEGED VIOLATIONS

This Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, (“CWA” or “the Act”) that River Watch believes are occurring at Markham Vineyards located at 2812 St. Helena Hwy. N. (“the Winery”). Notice is being sent to you as the responsible owners, operators, and managers of the Winery and real property. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from the Winery directly into the Napa River (*see* Notice of Intent dated February 3, 2015), a navigable water of the United States impaired under CWA § 303(d) for nutrients, pathogens, sedimentation/siltation.

CWA § 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge complies with various enumerated sections of the Act. Among other things, CWA § 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual National Pollutant Discharge Elimination System (“NPDES”) permit or a

general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. § 1342(p). CWA § 402(p), 33 U.S.C. § 1342(p) establishes a framework for regulating storm water discharges under the NPDES permitting program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. Environmental Protection Agency (“EPA”) has authorized California’s State Water Resources Control Board (“SWRCB”) to issue NPDES permits including general NPDES permits in California.

The SWRCB elected to issue a statewide general permit for industrial dischargers and issued NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ (the “General Permit”), amending it significantly on April 1, 2014 (effective July 1, 2015), pursuant to CWA § 402(p). In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and comply with its terms.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under CWA § 505(a) of the Act. Notice must be given to the alleged violator, the EPA, and the state in which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred and continue to occur at the Winery. Consequently, Markham Vineyards and Distinguished Vineyards & Wine Partners are placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Notice, River Watch will be entitled to bring suit in the United States District Court against the Winery for continuing violations of an effluent standard or limitation, NPDES permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, CWA § 301(a), § 402(p), and § 505(a)(1)), as well as the failure to comply with applicable water quality standards set forth in the California Toxics Rule (“CTR”), and the San Francisco Bay Regional Water Quality Control Board (“RWQCB”) Water Quality Control Plan or “Basin Plan.”

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

- 1. The Specific Standard, Limitation, or Order Alleged to Have Been Violated.**

To comply with this requirement, River Watch notices the Winery of ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of NPDES Permit No. CAS000001 (the General Permit) relating to services and operations taking place at the Winery.

The Winery, rather than seeking coverage under an individual NPDES permit, filed Notices of Intent (“NOI”) agreeing to comply with the terms and conditions of the General Permit. The SWRCB approved the first NOI on or about April 3, 1992 and assigned Waste Discharge Identification (“WDID”) number 2 28I003333 to the Winery. River Watch, on the basis of eye-witness reports, records publicly available, and/or records in the possession and control of the Winery, contends that in the continuing industrial operations taking place at the Winery, the

Winery has failed to comply, from Annual Reporting Year 2015-2016 to the present, with the strict terms and conditions of the General Permit.

In addition to the alleged violations of the terms and conditions of the General Permit, River Watch alleges violations of the provisions of discharge prohibitions contained in the RWQCB's Basin Plan, which are incorporated by reference as part of the compliance obligations imposed on the Winery under the General Permit (General Permit Section I.C.29).

2. The Activity Alleged to Constitute a Violation.

Full compliance with the mandates of the General Permit is not a mere statutory and regulatory exercise. The lands in and surrounding the Napa County Watershed produce a harvest of unparalleled bounty drawing acclaim worldwide. Failing to care for this critical environment as alleged in this Notice is a violation not only of law, but an abrogation of the trust we demand of Sonoma County landowners.

The Winery's industrial operations, are detailed in the October 13, 2016 Storm Water Pollution Prevention Plan ("SWPPP") Section IV.A. (*"Potential Pollution Sources / Industrial Processes"*) as: "1. Approximately 1400 to 2000 tons of grapes are weighed, unloaded, and then processed into grape juice or grape must at Markham Vineyards each Fall, usually between mid August and mid October."

The Winery is classified on the NOI as SIC Code 2084 ("Wines, Brandy, and Brandy Spirits"). Industrial operations at the Winery are conducted both indoors and outdoors, where they are subject to rain events. Because there is no public record of a SWRCB or RWQCB exemption from the collecting and analyzing of the range of pollutants discharged from the Winery site, without implementing and properly reporting the full range of required sampling and analysis there is no accurate measure by which to determine whether required Best Management Practices ("BMPs") under General Permit Section X are both implemented at the Winery and effective to ensure no unlawful discharge(s) of the pollutants from the Winery to the Napa River – a water of the United States.

Having agreed to its terms, the Winery has a continuing burden to demonstrate compliance with each and every applicable provision of the General Permit. River Watch alleges the following actions and inactions as violations of the General Permit:

a. Failure to Properly Sample and Monitor Storm Water Discharges

Under the General Permit, the Winery is required to comply with all of the terms of the General Permit including, but not limited to, the following:

- i. "Collect and analyze storm water samples from two (2) Qualifying Storm Events ("QSEs") within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30)" (General Permit Section XI.B.2, and SWPPP Section VIII.G (*"Monitoring Implementation Plan / Sampling and Analysis from QSEs"*)).

River Watch, following review of the SWRCB's SMARTs reporting database, contends the Winery failed to comply with this requirement by sampling for only three of the required four QSEs during the 2017-2018 Annual Reporting year and only two of the required four QSEs during the 2019-2020 Annual Reporting year. The "explanation" for each alleged violation under the Annual Report's "Summary of Explanations" for Questions 3 varies: in 2017-2018 because "[t]here was only one QSE in 2017"; and in 2019-2020 because "[the responsible employee] was out sick during Authorized storm water events during 2019, there is no other qualifying person in company that can collect samples. I was only able to get samples for 2020 Authorized storm water events. please let me know if you need more info." None of these "explanations" is sufficient and supported by the terms and conditions imposed under the General Permit.

- ii. Analyze all collected samples for the following parameters: "(a) Total suspended solids (TSS) and oil and grease (O&G); (b) pH ...; (c) Additional parameters identified [by the Winery] on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.a.-c.).

River Watch, following review of the Annual Reports and laboratory test results of the storm water samples reported by the Winery on the SWRCB's SMARTs reporting database, alleges the Winery fails to sample and monitor for the full range of pollutants required by the General Permit. In addition to Oil and Grease, Total Suspended Solids, and pH, which is sampled and monitored, the Winery is required to sample and monitor for "additional parameters identified by the Winery on a facility-specific basis that serve as indicators of the presence of industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.c). In its revised October 2016 SWPPP, the Winery provides a comprehensive list of "potential pollutant sources" (Section V. Table 1 "*Assessment of Potential Pollution Sources*" and SWPPP Appendix ("*List of Chemicals used in Wine Production*"). To ensure that the potential pollutant list is accurate, River Watch concludes a "reasonable potential analysis" should be conducted by the Winery to determine with accuracy what pollutants are actually on site, used in industrial operations, and require sampling and monitoring. Revisions to the list would require a further amendment to the 2016 SWPPP.

In addition, the General Permit provides in Section III.C. "Discharge Prohibitions" that [i]ndustrial storm water discharges and authorized NSWDS that contain pollutants that cause or threaten to cause pollution, *contamination, or nuisance as defined in section 13050 of the Water Code, are prohibited*" (emphasis added). Water Code § 13050 provides, in relevant part:

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l) (1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

- (A) The waters for beneficial uses.
- (B) Facilities which serve these beneficial uses.
- (2) "Pollution" may include "contamination."

(m) "Nuisance" means anything which meets all of the following requirements:

- (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
- (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
- (3) Occurs during, or as a result of, the treatment or disposal of wastes."

River Watch alleges that the discharge of the pollutants copper and zinc from industrial sources such as on-site materials containing zinc or copper and transportation-related activities at the Winery are above CTR limits and therefore prohibited as "contamination" or "nuisance" under the General Permit. River Watch believes that targeted monitoring/sampling is required at the Winery site to determine whether, and if so to what extent, zinc and copper are being discharged from the Winery directly to the Napa River.¹

b. Failure to Monitor Discharges from Ponds and Implement Effective Erosion Control

The Winery includes the use and operation of "waste water ponds" variously also titled "waste water treatment ponds," and "mixed waste processing ponds" (see SWPPP Section IV. "Potential Pollution Sources"), which are located adjacent to the Napa River. BMPs in SWPPP Section VI. ("*Best Management Practices (BMPs)*") are not detailed sufficiently to determine whether the ponds are lined or unlined, and whether they are sufficient to hold all regulated storm water prior to evaporation, reuse, or recycling at the Winery. Note that the General Permit and RWQCB Order No. 98-064 regulate discharges to groundwater from the "ponds" at the Winery.

The Winery's "*Erodible Surfaces*" identified in SWPPP Section VI.F is not detailed sufficiently to determine whether the roadways used for the trucking of supplies to, from, and within the Winery are constructed and maintained to properly control storm water discharges from the Winery.

c. Failure to Comply with Receiving Water Limitations and Discharge Prohibitions

The General Permit requires dischargers to ensure that industrial storm water discharges and authorized NSWDs do not: (a) cause or contribute to an exceedance of any applicable water quality standards in the Napa River (General Permit Section I.E.37, VI.A.), (b) adversely affect

¹ Note that the General Permit provides no blanket exclusion for on-site vehicle use. The General Permit, Appendix 2 ("Instructions For No Exposure Certification (NEC)") mirrors text from the EPA's "Guidance Manual for Conditional Exclusion from Storm Water Permitting Based on 'No Exposure' of Industrial Activities to Storm Water" (EPA 833-B-00-001, June 2000) to provide that "Adequately maintained vehicles" are among the list of "Industrial Materials/Activities Not Requiring a Storm-Resistant Shelter" (see Appendix 2.B.4.d.). In the absence of any sampling for zinc or copper at the Winery, however, it is not possible to determine whether the considerable number of vehicles, both owned/operated and maintained by the Winery, as well as those driven separately by private vendors involved in industrial activities at the site, are "adequately maintained."

human health or the environment (General Permit Section VI.B.) and, (c) do not contain pollutants in quantities that threaten to cause pollution or a public nuisance (General Permit Section III.C., VI.C.). The Winery provides no evidence of complete compliance with these requirements for the Winery's transportation-related areas, pomace disposal area, and in the absence of monitoring wells its wastewater ponds.

d. Failure to Comply with Total Maximum Daily Loads (TMDLs) Requirements

The Napa River and its tributaries are listed under CWA § 303(d) as impaired for nutrients, pathogens, and sedimentation/siltation. When the Winery applied for NOI coverage under the General Permit, it was required to submit data and/or information, prepared by a Qualified Industrial Storm Water Practitioner demonstrating that the Winery: (1) eliminated all exposure to storm water of the pollutants for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such documentation with the SWPPP at the Winery, (2) the pollutant for which the water body is impaired is not present at the Winery, or (3) the discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard (General Permit Section VII.B.). River Watch could find no documentation demonstrating compliance with these requirements.

e. Failure to Prepare and Implement an Adequate SWPPP

The SWPPP for the Winery fails to include a sufficient narrative assessment of all areas of industrial activity with potential industrial pollutant sources: (i) likely to be present in industrial storm water discharges and authorized NSWDS, (ii) the degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water, and (iii) the identification of the industrial pollutants related to the receiving waters with CWA § 303(d) listed impairments or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters (General Permit Section X.G.2.i, iv, and ix). Although the Winery has identified certain facility-specific activities at the Winery known to create pollution, it fails to identify additional parameters associated with these facility-specific industrial pollutants. For example, the Winery identifies transportation activities taking place at the Winery but fails to test for copper or zinc which are known pollutants from tires, brake pads, fuels and lubricants. The Winery has also failed to identify or test for these transportation-related pollutants in the parking lots, vehicle storage area(s), or other transportation surfaces at the Winery.

3. The Person or Persons Responsible for the Alleged Violation.

The entities responsible for the alleged violations are Markham Vineyards and Distinguished Vineyards & Partners as owners and operators of the Winery and real property underlying the Winery.

4. The Location of the Alleged Violation.

The location of the various violations is the permanent address of the Winery at 2812 Saint Helena Hwy N. in St. Helena, California, and including the waters of the Napa River – a water of the United States.

5. The Date or Dates of Violation or a Reasonable Range of Dates During Which the Alleged Activity Occurred.

The range of dates covered by this Notice is from September 8, 2015 to the present. This Notice includes all violations which occur after the range of dates covered by this Notice up to and including the end of trial. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. The Full Name, Address, and Telephone Number of the Person Giving Notice.

The entity giving this Notice is California River Watch, an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California. River Watch's mailing address is 290 South Main Street, #817, Sebastopol, California 95472. River Watch is dedicated to protecting, enhancing and helping to restore surface water and ground waters of California including coastal waters, rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and to educating the public concerning environmental issues associated with these environs.

River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be directed to:

David Weinsoff, Esq.
Law Office of David Weinsoff
138 Ridgeway Avenue
Fairfax, CA 94930
Tel. 415-460-9760
Email: david@weinsofflaw.com

REMEDIAL MEASURES REQUESTED

River Watch believes that at a minimum, implementing the requirements of the General Permit as outlined in this Notice is necessary in order to bring the Winery into compliance with the CWA and reduce the biological impacts from its non-compliance upon public health and the environment.

CONCLUSION

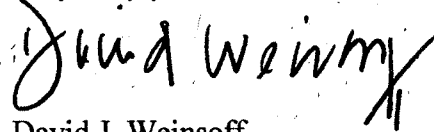
The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch may use the affected watershed for recreation, sports, fishing, swimming, hiking, photography, nature walks and/or the like. Their health, use, and enjoyment of this natural resource is specifically impaired by the Winery's alleged violations of the CWA as set forth in this Notice.

The General Permit, in the very first "Standard Condition," states that "Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code and is grounds for enforcement action and/or removal from General Permit coverage" (General Permit Section XXI.A). The gravity of ensuring that the Annual Reports submitted to the State of California are complete and accurate is highlighted by the General Permit requirement that the person signing and certifying the document certifies that "to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations" (General Permit Section XXI.L).

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. §1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$55,800.00 per day/per violation pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Notice sufficiently states grounds for filing suit in federal court under the "citizen suit" provisions of CWA to obtain the relief provided for under the law.

The CWA specifically provides a **60-day** "notice period" to promote resolution of disputes. River Watch encourages the Winery to contact counsel for River Watch within **20 days** after receipt of this Notice to continue on-going discussions regarding the allegations detailed in this Notice. In the absence of productive discussions to resolve this dispute, or receipt of additional information demonstrating the Winery is in compliance with the strict terms and conditions of the General Permit, River Watch will have cause to file a citizen's suit under CWA § 505(a) when the 60-day notice period ends.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Weinsoff", with a stylized flourish at the end.

David J. Weinsoff

DW:lm

Service List

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460

John W. Busterud, Regional Administrator
U.S. Environmental Protection Agency
Pacific Southwest, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Eileen Sobeck, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Markham Vineyards
c/o C T Corporation System, Registered Agent
1908 Thomes Ave.
Cheyenne, WY 82001-3527

Lion Nathan USA, Inc.
c/o National Registered Agents, Inc., Registered Agent
818 W 7th St. Ste 930
Los Angeles, CA 90017-3476